NO. 43493-8-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MARX WAYNE COONROD,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

The Honorable Richard Melnick, Judge

OPENING BRIEF OF APPELLANT

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A ASSIGNMENT OF ERROR

1. The sentencing court imposed a vindictive sentence in violation of the Fourteenth Amendment's due process protections.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. Under the Fourteenth Amendment, a court is prohibited from punishing a defendant for exercising his constitutional or statutory rights. Where, following a defendant's successful challenge to a conviction or sentence, the court imposes a higher sentence on resentencing, the new sentence is presumed to be vindictive unless the court identifies a reason based upon objective information about the defendant's conduct obtained after the initial sentencing hearing. Here, Mr. Coonrod faced a standard range of 87 to 116 months. The sentencing court originally gave Mr. Coonrod a mid-range sentence of 100 months, but a second judge imposed a sentence at the top of the standard range when Mr. Coonrod was re-sentenced. Where the judge relied on no new information concerning Mr. Coonrod's current offenses, must the sentence be vacated as vindictive?

C. STATEMENT OF THE CASE

Appellant Marx Coonrod was charged with five counts of first degree robbery and three counts of attempted first degree robbery in 2007. Clerk's

Papers [CP] 1. On September 10, 2008, he entered an *Alford* plea to one count of first degree robbery and two counts of attempted first degree robbery. CP 5. After entering the plea, Mr. Coonrod moved to disqualify his attorney for conflict of interest, filed a grievance against him with the Washington State Bar Association (WSBA), and asked the court to appoint new counsel. *State v. Coonrod*, No. 38490-6-II (Slip Op. filed February 9, 2010), available at 2010 WL 437968.

Mr. Coonrod moved to withdraw and change his plea. The court denied Mr. Coonrod's request for new counsel and required that he argue his motion to withdraw his plea without assistance of counsel. *Coonrod*, 2010 WL 437968 at *2. The trial court denied the motion to withdraw his plea and proceeded to sentencing. *Coonrod*, at *4. Mr. Coonrod's standard range was 87 to 116 months. The Honorable Robert Harris imposed a mid-range sentence of 100 months. Report of Proceedings [RP] at 145; CP 64. Mr. Coonrod appealed from the denial of his motion to withdraw his plea and his sentence. CP 76, 88. In an Unpublished Opinion, this court vacated his sentence and remanded the case to (1) appoint new trial counsel, (2) reconsider Mr. Coonrod's motion to withdraw his plea and (3) resentence Mr. Coonrod if it does not hear or denies the motion to withdraw the plea.

Coonrod, at *6.

On remand, Mr. Coonrod was appointed new trial counsel and alleged, *inter alia*, that he was factually innocent because he was physically unable to have performed the robberies due to degeneration of his hips. Mr. Coonrod's new counsel filed a motion to withdraw his plea on July 8, 2011. CP 168. Counsel filed an affidavit in support of the motion by Dr. Price Chenault, who stated that in early 2010 Mr. Coonrod exhibited signs of advanced arthritic deterioration of both hips, and "had suffered the complete loss of his hip joint spaces." CP 179. Dr. Chenault performed a double hip replacement on Mr. Coonrod on February 16, 2010. He stated that "Mr. Coonrod's right hip was in exceptionally poor condition: there was bone on bone contact, which explained why Mr. Coonrod could barely move." CP 180.

Following several hearings and closing argument on March 22, 2012, the court denied the motion to withdraw the *Alford* plea in a written decision filed April 2, 2012. RP at 130; CP 252.

Resentencing occurred before the Honorable Richard Melnick on April 5, 2012. RP at 130. The State argued that Mr. Coonrod stipulated to his criminal history and to a range of 87 to 116 at sentencing in 2008 in order

to take advantage of the State's plea offer. RP at 139-140. Based on an offender score of 7, the court determined Mr. Coonrod's standard range was 87 to 116 months. RP at 160.

Under the plea agreement, the defense was free to argue within the stipulated range. RP at 140. The prosecution made the same recommendation as it did in 2008, and requested a sentence at the top of the range of 116 months, with credit for 1899 days served. RP at 143. Mr. Coonrod stated that he should receive credit for 1915 days served. RP at 146.

Defense counsel argued that the previous sentencing judge waived the Legal Financial Obligations except restitution, but made no argument or recommendation regarding the sentence length other than by asking that Mr. Coonrod's Early Release Date of November 5, 2012 be preserved. RP at 144.

Judge Melnick sentenced Mr. Coonrod to 116 months—16 months more than he received in 2008—with credit for 1899 days served. RP at 161.

Timely notice of appeal was filed May 14, 2012. CP 300. This appeal follows.

D. ARGUMENT

1. THE COURT VIOLATED MR. COONROD'S CONSTITUTIONAL RIGHT TO DUE PROCESS WHEN IT IMPOSED A SENTENCE AT THE

TOP OF THE STANDARD SENTENCE RANGE UPON RESENTENCING FOLLOWING A SUCCESSFUL APPEAL IN THE ABSENCE OF A FACTUAL BASIS TO JUSTIFY WHY THE PREVIOUSLY-IMPOSED MID-RANGE SENTENCE WAS NO LONGER APPROPRIATE

a. Mr. Coonrod may challenge his sentence on appeal.

Mr. Coonrod appeals from his sentence imposed on remand from this Court. The sentencing court originally imposed 100 months. CP 64. On remand, the standard range of 87 to 116 months remained undisturbed. Although Judge Harris imposed a mid-range sentence in 2008, on remand Judge Melnick imposed the maximum term of 116 months. RP at 161. This Court should reverse Mr. Coonrod's sentence and remand for a new sentencing hearing before a different judge.

Washington courts have traditionally addressed challenges to sentences even if the challenge was not raised in the trial court. *State v. Ford*, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999) (illegal or erroneous sentence may be challenged for first time on appeal); *State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (defendant may challenge procedure by which standard range sentence imposed for first time on appeal), cert. denied, 479 U.S. 930 (1986).

RAP 2.5(a) also gives this Court the discretion to address constitutional issues even if they were not raised in the trial court. Appellate courts have therefore addressed due process challenges argued for the first time on appeal. *State v. McCullum*, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983) (jury instruction that shifted burden of proof to defendant).

In determining whether to review a constitutional error for the first time on appeal, the appellate court first determines if the error is truly of constitutional magnitude and, if so, determines the effect the error had on the trial using the constitutional harmless error standard. *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). An error is manifest if it has "practical and identifiable consequences" in the case." *State v. Schaler*, 169 Wn.2d 274, 282, 236 P.2d 858 (2010).

Vindictive sentencing is a constitutional issue under the Fourteenth Amendment. The error is manifest in this case, as it resulted in a significantly higher sentence than would otherwise be imposed. Mr. Coonrod may therefore raise this issue.

b. The Fourteenth Amendment protects defendants from vindictive sentencing after the reversal of a conviction or sentence.

The Fourteenth Amendment's due process clause prohibits the court or prosecutor from penalizing a defendant for exercising his constitutional or statutory rights. U.S. Const. amend. XIV; *North Carolina v. Pearce*, 395 U.S. 711, 723-24, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled in part, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

In *Pearce*, the Supreme Court held that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction. *Pearce*, 395 U.S. at 723. A trial judge is not constitutionally precluded from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities." *Pearce*, 395 U.S. at 723 (quoting *Williams v. New York*, 337 U.S. 241, 245, 69 S. Ct. 1079 93 L. Ed. 1337 (1949)). However, "[i]t can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an unannounced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside." *Pearce*, 395 U.S. at 723-24.

The Due Process Clause of the Fourteenth Amendment requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. Since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge. *Pearce*, 395 U.S. at 725.

The Pearce Court held that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his or her doing so must affirmatively appear. The *Pearce* Court also held that those reasons must be based upon objective information concerning identifiable conduct by the defendant occurring after the time of the original sentencing proceeding. The factual basis upon which the increased sentence is based must also be made part of the record, to ensure full appellate review. *Pearce*, at 726.

c. The imposition of a top of the range sentence after Mr. Coonrod's successful appeal was vindictive where he initially received a mid-range sentence and there were no new facts to justify the change.

Here, the *Pearce* presumption cannot be overcome. Between the first and second sentencing, there were no "events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.'" *Pearce*, at 723 (citing *Williams*, 337 U.S. at 245). In fact, Judge Melnick made no such claim. Rather, the judge merely stated that he is "not bound by Judge Harris's sentencing, which was the whole purpose of the remand, but I will use that as some guidance." RP at 143-44. The court failed to cite any events or facts that had occurred since Judge Harris sentenced Mr. Coonrod in 2008 to support an increased sentence, contrary to *Pearce*.

d. Re-sentencing before a different Judge should be the remedy.

Because there is a realistic likelihood Judge Melnick acted vindictively in imposing the increased sentence in this case, and because the *Pearce* presumption cannot be overcome, this Court should reverse and remand for resentencing before a different judge. The sentencing court imposed a sentence at the top of the standard range. The new sentence was not based upon any "identifiable conduct on the part of the defendant occurring after the time of the original sentencing hearing." *Pearce*, 395 U.S. at 726. Thus, the higher sentence is presumed to be vindictive. Because no

evidence in the record supports the court's decision, Mr. Coonrod's sentence must be vacated and remanded to impose a sentence at the middle of the standard range. *State v. Ameline*, 118 Wn. App. 128, 133-34, 75 P.3d 589 (2003).

E. CONCLUSION

Mr. Coonrod received a mid-range sentence after his successful appeal which was sixteen months higher than the mid-range sentence imposed at the first sentencing hearing. Because the court did not identify any new information to justify the top of the range sentence, the sentence is presumptively vindictive, and must be vacated.

DATED: November 5, 2012.

Respectfully submitted,
THE TILLER LAW FIRM
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Of Attorneys for Marx Coonrod

CERTIFICATE OF SERVICE

The undersigned certifies that on October 25, 2012, this Opening Brief of Appellant was e-filed to (1) the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and (2) Ms. Anne Cruser, Deputy Prosecutor at Anne.cruser@Clark.wa.gov and copies were mailed by U.S. mail, postage prepaid, the appellant, Mr. Marx Wayne Coonrod, DOC #839750, Stafford Creek Correction Center,

191 Constantine Way, Aberdeen, WA 98520 **LEGAL MAIL/SPECIAL MAIL**

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on October 25, 2012.

Peter B. Tiller

PETER B. TILLER

TILLER LAW OFFICE

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